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No. 80-327

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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VALLEY FORGE CHRISTIAN COLLEGE, PETITIONER

*v.*

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS

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## QUESTION PRESENTED

Whether an organization dedicated to separation of church and state and four of its employees have standing, either in their capacity as taxpayers or as citizens, to challenge the federal government's sale of surplus military property to a church-related college on the ground that the sale violates the Establishment Clause of the First Amendment.*

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* The United States and the Department of Health, Education, and Welfare were defendants in the district court and appellees in the court of appeals. Pursuant to the Department of Education Organization Act, 20 U.S.C. (Supp. III) 3401 *et seq.*, the Department of Health, Education, and Welfare was abolished. Section 505(e) of the Act, 20 U.S.C. (Supp. III) 3505(e), provides that suits pending against HEW on its effective date shall survive with the Secretary of Education substituted as a party if, as here, the suit concerns governmental functions transferred to the Department of Education.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A41) is reported at 619 F.2d 252. The opinion of the district court (Pet. App. A42-A44) is not reported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. A45-A46) was entered on April 8, 1980. A petition for rehearing was denied on June 3, 1980 (Pet. App. A47-A48). The petition for a writ of certiorari was filed on August 30, 1980, and was granted on February 23, 1981 (J.A. 193). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution and of the Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377, 40 U.S.C. 471 *et seq.*, are set forth in the Appendix, *infra.*

## STATEMENT

### 1. Procedures for disposition of surplus military property

Article IV, Section 3, Clause 2, of the Constitution vests Congress with plenary power "to dispose of" and make necessary rules and regulations respecting surplus property belonging to the United States. Under this provision, Congress enacted the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 *et seq.*, a statute that was intended, *inter alia*, "to provide for the Government an economical and efficient system for * * * the disposal of surplus property" (40 U.S.C. 471). "Surplus property" is defined by statute to include any property that exceeds the needs of the particular federal agency responsible for the property and that is "not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the [General Services] Administrator" (40 U.S.C. 472(g)).

If a military department, such as the Army, Navy or Air Force, determines that it no longer needs a particular piece of property, it first offers the property to the other military departments and the United States Coast Guard. If none of those departments has a need for the property, the Secretary of Defense so reports to the Armed Services Committees of the Senate and House of Representatives. See 10 U.S.C. 2662. If Congress takes no action with respect to the property, the military department notifies the General Services Administration

(GSA), which offers the property to other agencies of the federal government. If there is no need for the property at any such agency, GSA takes steps to dispose of the surplus property in consultation with state and local governments in the geographic area involved, as well as the Department of Health, Education, and Welfare (now the Department of Health and Human Services and the Department of Education), the Department of the Interior, the Federal Aviation Administration, and committees of citizens from the affected community (C.A. App. 228-231).[1]

The Secretary of Health, Education, and Welfare (now the Secretary of Education) is authorized to assume responsibility for surplus federal property and to convey such property, "including buildings, fixtures, and equipment situated thereon, as * * * needed for school, classroom, or other educational use * * *" (40 U.S.C. 484(k)(1)). The Secretary may sell or lease such property "to the States and their political subdivisions and instrumentalities, and tax-supported educational institutions, and to other nonprofit educational institutions which have been held exempt from taxation" under the Internal Revenue Code (40 U.S.C. 484(k)(1)(A)). In fixing the consideration for sale of surplus property to a private nonprofit educational institution, the Secretary must "take into consideration any benefit which has accrued or may accrue to the United States from the use of such property" by the purchasing institution (40 U.S.C. 484(k)(1)(C)).

Pursuant to this statute, the Secretary has promulgated regulations (34 C.F.R. Part 12; see also 45 C.F.R. Part 12) designed to "foster and assure maximum utilization of surplus real property for educational purposes * * *" (34 C.F.R. 12.3(a)). The regulations require the Secretary to give reasonable publicity to the avail-

[1] "C.A. App." refers to the joint appendix in the court of appeals.

ability of surplus real property that is suitable for educational purposes (34 C.F.R. 12.6) and to select purchasers proposing a use of the property that provides "the greatest public benefit" (34 C.F.R. 12.5). Purchasers must demonstrate that they are willing and able to assume immediate care, custody and maintenance of the property, are financially able to assume all administrative expenses incident to the transfer, and are financially able to carry out the approved program for use of the property (34 C.F.R. 12.8). Finally, the regulations provide that nonprofit educational institutions purchasing surplus property are entitled to a reduction in the purchase price expressed in terms of a "public benefit allowance." Such an allowance is "computed on the basis of benefits to the United States from the use of such property for educational * * * purposes" (34 C.F.R. 12.9). In determining the amount of the allowance in a particular case, the Secretary considers factors such as the educational institution's accreditation, public service training programs, plans to introduce new instructional programs, commitment to student health and welfare, and intention to undertake programs such as research and service to the handicapped (34 C.F.R. Part 12, Exh. A). Those factors, considered together, may entitle a purchasing institution to a 100% public service allowance that enables it to acquire the property without further cash payment to the United States.[2]

**2. The surplus military property at issue in this case**

In 1942, the Department of the Army acquired approximately 181 acres of land, together with a small

[2] In light of the special economic problems created by the closing of military bases in particular communities, dispositions of surplus military real estate also require notification to the Office of Economic Adjustment and the President's Economic Adjustment Committee. The Economic Adjustment Committee works with the affected community and encourages it to develop a Reuse Plan for the property to minimize adverse effects of the government's disposition. See C.A. App. 230-236.

easement interest, in Chester County near Phoenixville, Pennsylvania, about 30 miles northwest of the City of Philadelphia. The fee interest and easement cost $41,553. During the next several years, the land was improved with hospital buildings, warehouses, administration buildings, and barracks at a total cost of $13,046,048. For 30 years thereafter, the Army used the completed facility, known as the Valley Forge General Hospital, to provide medical care for members of the armed services (C.A. App. 237-238).

In April 1973, the Secretary of Defense announced plans to consolidate, reduce or eliminate a large number of military installations in the United States, and included in his announcement the proposed closing of Valley Forge General Hospital by July 1974. In a report to Congress, the Army explained that the decision "was reached from the standpoints of declining workload, reduction of end strength of the Army, economy, and the scheduled availability of modern medical facilities at other Army hospitals" (C.A. App. 237-238). Since the property was excess with respect to the needs of the military, it was reported to the General Services Administration for disposition (*ibid.*). After giving notice of the availability of the property to the agencies of the federal government, GSA declared the property to be surplus (*id.* at 228-231).

Following the closing of the Valley Forge General Hospital in 1974, care and custody of the 181 acre tract, and the buildings and equipment on it, became the financial responsibility of the Department of the Army (C.A. App. 231). Between 1974 and 1976, several government agencies, including the Department of Defense, GSA, HEW, the Department of Interior, and the President's Economic Adjustment Committee, reviewed plans to dispose of the property (*id.* at 228-231). After an initial unsuccessful attempt to convey the property to the Commonwealth

of Pennsylvania,[3] the 181 acre tract was divided among several public recipients and petitioner Valley Forge Christian College.[4] The college (then known as the Northeast Bible College) purchased a tract of approximately 77 acres of land. The value of that land, as appraised prior to its conveyance, was $577,500.[5]

In its application for the 77 acre tract (C.A. App. 247-261), the college stated that it was a nonprofit educational institution operating under the supervision of

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[3] The Department of Education advises us that notice of the availability of the surplus property was given to the Governor of Pennsylvania, the mayor and other local officials in the county, regional planning authorities, and residents within the community. GSA and HEW originally sought to convey the bulk of the property to the Commonwealth of Pennsylvania for a Veterans' Hospital, with certain smaller parcels allocated to surrounding school districts and a junior college. HEW gave the Commonwealth an interim permit to utilize the land but did not convey title because the Commonwealth could not demonstrate financial ability to carry through its projected use of the property. Subsequently, the legislature failed to appropriate funds for the hospital and the Commonwealth vacated the property.

[4] The Department of Education advises us that 34 acres were conveyed to the Phoenixville School District for general educational use. A consortium of other school districts received an additional 15 acres for special educational purposes. The General Services Administration conveyed 55 acres of the tract for park and recreational use, upon approval of the Department of the Interior. The Valley Forge Christian College purchased the remaining land.

[5] The appraiser noted in his report that the land had a per acre value, but no value could be placed on its buildings and fixtures. He observed (C.A. App. 242-243):

> [T]hese buildings were constructed several years ago for one purpose only, that is for an army hospital, and it is my feeling that they have little or no use, generally speaking, for other purposes. * * * [T]he expense involved in razing, regrading, repaving, relocating roads and streets, changing and relocating water/sewer lines, etc.[,] would be tremendous. * * * The value of * * * [the] buildings one can utilize would be offset by the renovations required plus the razing costs of the buildings not needed.

certain divisions of a religious order known as the Assemblies of God (*id.* at 249). The college intended to use the land to conduct "a program of education * * * meeting the accrediting standards of the State of Pennsylvania, The American Association of Bible Colleges, the Division of Education of the General Council of the Assemblies of God and the Veterans Administration" (*id.* at 250). The college further asserted that its graduates engaged in work in the ministry, counselling, teaching, youth supervision, business, and state and federal government administration. Other students pursued post-graduate training at a wide variety of public and private universities. The college represented that, if it obtained the property, it would make "additions to its offerings in the arts and humanities" and would strengthen its "psychology" and "counselling" courses to provide services in inner city areas. It also offered to encourage academic research and independent study at the new campus (*id.* at 250, 261).

The college stated in its application that it planned to make use of certain existing buildings on the 77 acre tract as administrative offices, classrooms, laboratories, libraries, and housing facilities (C.A. App. 255). Renovation of the buildings and construction of new structures would be achieved by the employment of local tradesmen and the recruitment of volunteers (*id.* at 256). The estimated cost of setting up the college on its new campus and renovating existing buildings was $800,000 (*id.* at 259-260). This amount would be derived from various college councils, alumni associations, and gifts (*ibid.*). In emphasizing its need for a new campus, the college noted the "overcrowd[ing]" of its current campus, the existence of certain "fire hazards" on its property, and its inability to find alternative locations for a new campus (*id.* at 257).

Upon approval of the college's application in August 1976, HEW granted the college a deed for the 77 acre tract, which reflected a 100% public benefit allowance

(C.A. App. 262-275). The deed conveyed the land in fee simple with certain conditions subsequent, which required the college to use the land for 30 years solely for the educational purposes described in the application. The college was forbidden to sell or encumber the land except under stated circumstances, and was required to comply with applicable federal civil rights legislation (*id.* at 266-272). Finally, the deed provided that the United States retained the right during periods of emergency to regain possession and use of the property and any improvements on it (*id.* at 272-273). In conjunction with this conveyance of land, HEW also conveyed to the college certain surplus personal property located on the premises (*id.* at 276-309). Following these transfers of real and personal property, the college relocated its campus on the 77 acre tract and expended funds needed to convert the former hospital to a college (*id.* at 15).

### 3. Proceedings in the district court

In September 1976, respondents Americans United For Separation of Church and State, Inc., and several of its employees, learned of the property conveyance through a news release (C.A. App. 159, 194). They brought suit to challenge the conveyance two months later. In an amended complaint filed in the United States District Court for the Eastern District of Pennsylvania, Americans United described itself as a non-profit organization made up of 90,000 taxpayer members and located in the District of Columbia. The complaint asserted that "[e]ach of these taxpayer members will be affected just as though they were a separate individual plaintiff * * * and each individual member would be deprived of the fair and constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution" (J.A. 10). In addition, the complaint named as plaintiffs four individual members and officers of the organization, who resided in Maryland and Virginia (*ibid.*).

In its charging paragraphs, the complaint recited that the United States had conveyed 77 acres of realty, with buildings thereon, to Valley Forge Christian College; that the college was religious in its orientation; and that the grant of property to the college was in violation of the Establishment Clause of the First Amendment (J.A. 11).[6] The complaint sought equitable relief, including a declaration that the grant of land and buildings to the college was null and void, as well as an order compelling the college to convey all right and title to the property "back to the United States Government * * *" (*id.* at 12).

In pretrial depositions, the four named plaintiffs explained the basis for their challenge to the conveyance. Andrew L. Gunn, Executive Director of Americans United, stated that his rights as a taxpayer and citizen were violated by the transfer (deposition of March 7, 1978, at 10-12). He asserted that his tax bill would have been less during 1976 if the government had not transferred the property (*ibid.*). He acknowledged, however, that the injury he suffered was "shared in common" with "the other taxpayers of the country" (*id.* at 26).[7]

Unlike Gunn, Edward E. Doerr, another employee of Americans United, doubted whether there was any "connection between the taxes in a particular year and the

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[6] Due to its disposition of the present case on standing grounds, the district court made no findings concerning the pervasiveness of religious instruction at the college. However, the college's catalogue of courses, and its interrogatory answers, show that it offers both religious and secular courses and receives students of various religious backgrounds (J.A. 122-125). There appears to be no dispute, however, that the college places considerable emphasis on religious instruction and values in some of its classes and that it prepares some of its students for the ministry.

[7] Gunn also asserted that "I as a taxpayer should not be forced to make contributions to another religion or to any religion" (deposition of March 7, 1978, at 29). He added that "my religious liberty is being trampled upon because the Government is taking—is fostering and promoting religion. It is not the business of the Government to do this" (*ibid.*).

disposition the Government makes of public property" (deposition of March 7, 1978, at 13). Nonetheless, he viewed himself as an "owner," along with the rest of the public, of all government property, and asserted that he is "injured when that property is disposed of improperly by the Government" (*id.* at 13-14). He acknowledged that his injury "is an injury * * * shar[ed] in common with other members of the public" (*id.* at 14, 35).[8] Doerr also stated that the value of the property conveyed was not material, since he would be "offended" by any transfer (*id.* at 29). He asserted: "I think when a constitutional principle is at stake, even a rather small conveyance of Government property is significant and offends me" (*id.* at 34).

Mallary Binns, Director of Operations of Americans United, repeated the view that he had a "vested interest" in federal property and that his rights as a "taxpayer" and "citizen" are violated by a conveyance to a religious organization. Those rights, according to Binns, are held in "common to taxpayers in general" (deposition of March 7, 1978, at 18-19). Binns also asserted that he would feel aggrieved by a transfer of property of any value: "If the property were worth $2,000, the loss in principle of the Government giving property of value to a religious institution would be wrong * * *[;] I wouldn't draw a line" (*id.* at 36).

Gioele Settembrini, Assistant to the Director of Americans United, asserted that "every citizen is injured" when government property is conveyed to a sectarian institution (deposition of March 7, 1978, at 13). Accordingly, a taxpayer is "damaged whenever a taxpayer doesn't draw benefit from a property which was given to an institution which is not owned by the general public" (*id.* at 15). When asked whether his interest in the

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[8] When asked whether there is "anything unusual about your loss as a taxpayer that's different from all the rest of the taxpayers," Doerr stated "[p]robably not" (deposition of March 7, 1978, at 36).

controversy differed from that of society at large, Settembrini stated (*id.* at 20): "I represent society."

On motion of the defendants, the district court granted summary judgment and dismissed the complaint (Pet. App. A42-A44). The district court found that the plaintiffs lacked standing to sue as taxpayers under *Flast* v. *Cohen*, 392 U.S. 83 (1968). In reaching that conclusion, the court observed that the plaintiffs challenged a transfer of property authorized by Article IV, Section 3, Clause 2, of the Constitution, and not an exercise of Congress' power to tax and spend. The court also noted that plaintiffs "failed to allege that they have suffered any actual or concrete injury beyond a generalized grievance" common to other citizens (Pet. App. A43). Accordingly, *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), stood as an additional barrier to suit (Pet. App. A44).

#### 4. The decision of the court of appeals

By a divided vote, the court of appeals reversed the district court's judgment and reinstated the complaint (Pet. App. A1-A41). All three members of the panel agreed that the plaintiffs lacked standing to sue in their capacity as "taxpayers." Citing *Flast* v. *Cohen*, *supra*, the court held that a taxpayer is a proper party to allege the unconstitutionality "only of exercises of congressional power under the taxing and spending clause of Art. I, § 8 of the Constitution" (Pet. App. A15). The court added that *Flast* has drawn a sharp distinction "between attacks by taxpayers on spending programs as such and attacks on other kinds of programs" (*id.* at A16-A17).

Nonetheless, the court of appeals found that the plaintiffs had standing to sue in their capacity as citizens to redress an " 'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion' " (Pet. App. A18). The court characterized their interest in the following terms: "the challenged action injures their important con-

cern in the separation of church and state and * * * [thus] is within the zone of interests protected by the Establishment Clause" (*id.* at A21). That interest, according to the court, was sufficiently "particular" and "concrete" to give rise to an actual case or controversy under Article III of the Constitution (*id.* at A27). The court added that "it is at the very least arguable that the Establishment Clause creates in each citizen a 'personal constitutional right' to a government that does not establish religion" (*id.* at A28-A29). Thus, "it may well be that the Establishment Clause should be enforceable at the demand of every individual who claims injury to an interest protected thereby" (*id.* at A29).

In a concurring opinion Judge Rosenn asserted that, in cases such as the present case, Establishment Clause violations do not "have an individual impact sufficient to confer standing in the traditional sense" (Pet. App. A33). Accordingly, in view of the perceived "need to provide a judicial forum" (*id.* at A35), Judge Rosenn would grant standing without a showing of discrete individual harm. Although Judge Rosenn acknowledged that, in the present context, "it is possible to conceive of economic interests that might give rise to a plaintiff who meets traditional standing requirements," he concluded that "Americans United is likely to be the best available plaintiff" (*id.* at A34).

Judge Weis dissented. While he agreed with the majority that the plaintiffs lacked standing to sue as taxpayers (Pet. App. A35), Judge Weis disagreed that they had alleged sufficient injury to themselves to have standing to sue as citizens. Judge Weis concluded that plaintiffs did not have standing because "a generalized grievance brought by concerned citizens seeking to enforce a particular constitutional guarantee has been deemed too abstract to satisfy the injury in fact component of standing" (*id.* at A36). He reasoned that this Court's decisions in *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, and *United States* v. *Richardson*, 418 U.S.

166 (1974), precluded litigation based on abstract objections to the constitutionality of the government's conduct. Judge Weis added that the plaintiffs "do not allege any direct injury that the transfer of the property has inflicted upon them or any direct benefit that will accrue to them as a result of the requested judicial action" (Pet. App. A39). In short, like the complaining parties in *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, 418 U.S. at 217, the plaintiffs here alleged only a generalized interest "shared by all citizens"—an interest not cognizable in federal court under Article III of the Constitution.

## SUMMARY OF ARGUMENT

### I.

The complaint in this case describes unambiguously the grievance that plaintiffs seek to litigate. The complaint alleges that each of the taxpayer members of Americans United For Separation Of Church And State would be injured by the government's sale of surplus military property to Valley Forge Christian College because "each individual member would be deprived of the fair and constitutional use of his (her) tax dollar * * * in violation of his (her) rights under the First Amendment" (J.A. 10). As the district court and each panel member in the court of appeals agreed, however, plaintiffs do not have standing to sue in their capacity as "taxpayers."

*Frothingham* v. *Mellon*, 262 U.S. 447 (1923), sets forth the general rule applicable to taxpayer suits. As a general proposition, taxpayers do not have standing to challenge governmental expenditures alleged to be in violation of the Constitution because a taxpayer's "interest in the moneys of the Treasury * * * is comparatively minute and indeterminable." The effect on future tax liability of any governmental disbursement "is [so] indefinite" as to be a "matter of public and not of individual concern" (*id.* at 487). These principles apply a

fortiori to the present taxpayer suit, which challenges a sale of military property designated as surplus—not annual disbursements of tax funds from the federal treasury.

Although this Court's decision in *Flast* v. *Cohen*, 392 U.S. 83 (1968), "slightly lowered" the barrier to taxpayer suits (*United States* v. *Richardson*, 418 U.S. 166, 173 (1974)), it prescribed definite limitations to prevent an inundation of taxpayer litigation. Plaintiffs in this case wholly fail to satisfy the *Flast* criteria for standing to sue. In unequivocal terms, *Flast* provides that "a taxpayer will be a proper party to allege the unconstitutionality *only* of *exercises of congressional power* under the *taxing and spending clause of Art. I, § 8*, of the Constitution" (392 U.S. at 102; emphasis supplied).

Plaintiffs fail to meet the narrowly defined standards prescribed in *Flast* because they attack an action of the executive branch (a sale of surplus property by HEW), rather than an enactment of Congress. As this Court recently has confirmed, plaintiffs may not challenge "the action[s] of the Executive Branch" on a taxpayer theory. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 228 (1974). Plaintiffs fail to satisfy the *Flast* standard for a separate and independent reason. Instead of challenging government action under "the Taxing and Spending Clause of Art. I, § 8," as required by *Flast*, they challenge government action under the property clause of Article IV, Section 3. This is an additional barrier to suit. See *United States* v. *Richardson*, *supra*, 418 U.S. at 175 ("[a]lthough the status [plaintiff] rests on is that he is a taxpayer, his challenge is not addressed to the taxing or spending power * * *").

This Court should decline plaintiffs' invitation to extend *Flast*. *Flast* deliberately prescribed limitations on taxpayer actions to prevent a flood of such suits. Both *Richardson* and *Schlesinger* refused to expand the scope of taxpayer standing and adhered to the limits prescribed in *Flast*. In any event, the present case offers no occa-

sion to enlarge taxpayer standing. Plaintiffs here challenge not the disbursement of tax revenues from the Treasury, but rather the decision of a government agency to sell a parcel of surplus property. They have no objection to the original use of their tax dollars. They object only to the identity of the purchaser with whom the government contracted after the useful life of the property was exhausted. Return of the property to the government, so that it could be sold to another nonprofit institution on similar terms, would not increase or preserve the government's wealth. To the contrary, it is likely to have quite the opposite effect. In these circumstances, the relationship between plaintiffs' status as taxpayers and the issue they seek to litigate is so remote, speculative and tenuous as to provide "no 'logical nexus' " sufficient to predicate standing to sue. *United States* v. *Richardson*, *supra*, 418 U.S. at 175, quoting *Flast* v. *Cohen*, *supra*, 392 U.S. at 102.

## II.

Having found that plaintiffs lack standing to sue as "taxpayers," the court of appeals should have affirmed the district court's dismissal of the complaint. The complaint alleges no other ground upon which standing to sue could be predicated. The complaint contains no mention of any individual harm that plaintiffs purportedly suffered as a consequence of the government's sale of surplus military property. There is no suggestion that the sale impaired their organizational activities, interfered with their right to worship or not to worship, or imposed on them uninvited ideas, orthodoxies, or religious observances. Indeed, if plaintiffs had not read about the sale of property in the newspaper, they never would have known that it occurred. The only effect of the transaction on plaintiffs was that it provoked their philosophical disapproval. And the abstract objection that they raised is no different than the objection that could have been raised by any other citizen.

Nonetheless, the court of appeals concluded that plaintiffs have standing to sue in their capacity as "citizens" because the action of the government infringed their right to live under a "government that does not establish religion" (Pet. App. A29). That theory of citizen standing, however, clashes with the decisions of this Court. This Court has held that plaintiffs may not challenge alleged violations of the Establishment Clause on a general citizen standing theory. For example, in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), the plaintiffs sued, *inter alia*, in their capacity as "citizens" to contest a state statute authorizing teachers to read from the Bible in the public schools. The governmental action challenged in *Doremus* denied the plaintiffs an opportunity to live under a "government that does not establish religion." This Court nonetheless ruled that standing was lacking, since the "citizen" plaintiffs alleged an abstract "religious difference" rather than palpable personal harm (*id.* at 434-435). *Doremus* confirms that plaintiffs do not have standing to sue in their capacity as citizens simply because they believe the government has taken some action that tends to establish religion. They must show particularized injury to themselves before invoking the judicial power.

Any remaining support for citizen standing in cases of this kind disappeared with the Court's rulings in *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, and *United States* v. *Richardson*, *supra*. Those decisions hold that claims of constitutional violations, which affect all citizens in the same way and do not inflict personal injury, may not be litigated in federal court. If parties wish to press abstract assertions that the government has wronged its citizens as a group, they must present their claims to the legislative and executive branches—branches that, like the judiciary, are responsible for enforcing the Constitution, but that, unlike the judiciary, are responsible for protecting all citizens against wrongs to the people as a whole.

Prudential considerations militate against recognition of general citizen standing. If this Court were to accept the notion that any citizen may bring suit to vindicate "important" constitutional guarantees without alleging personal injury, there would be an outpouring of citizen complaints. Federal courts would be required to assume a continuing oversight role with respect to the activities of the co-equal branches of government. While the number of such suits would dramatically increase, the vigor and quality of advocacy would decline, since the plaintiffs would no longer be motivated by a direct personal stake in the outcome of the litigation. This Court repeatedly has referred to these prudential concerns as grounds for strictly enforcing the Article III standing requirement. It should do so once again in the present case.

## ARGUMENT

### PLAINTIFFS LACK STANDING TO SUE BECAUSE THEY HAVE FAILED TO ALLEGE INJURY TO THEMSELVES AS A RESULT OF THE CLAIMED UNCONSTITUTIONAL CONDUCT

#### Introduction

As this Court frequently has observed, no principle is more fundamental to the federal judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to "actual cases or controversies." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976). The framers of the Constitution deliberately withheld from the federal courts power to act as a "Council of Revision," with general authority to review the constitutionality of the actions of the legislative and executive branches. See *United States* v. *Richardson*, 418 U.S. 166, 179 (1974); see also *id.* at 189-190 & n.9 (Powell, J., concurring). The Article III case or controversy requirement traditionally has meant that federal courts may pass on the

constitutionality of an action of a co-equal branch of government only when the constitutional issue is tendered by a plaintiff with standing to sue—that is, by a plaintiff who alleges actual definable injury to himself. Thus, the power to adjudicate the constitutionality of governmental action is "legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892). This is but a reflection of "the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

This Court's decisions construing the Article III limitation on federal jurisdiction establish that a plaintiff claiming standing to sue "must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979). This requires an allegation of " 'distinct and palpable injury to himself' * * * that is likely to be redressed if the requested relief is granted" (*id.* at 100, quoting *Warth* v. *Seldin, supra*, 422 U.S. at 501). Moreover, even when a case falls within these constitutional boundaries, "a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated * * *" (*id.* at 99-100).

The requirement of concrete personal injury assures that plaintiffs do not seek to employ federal courts "as a forum in which to air * * * generalized grievances about the conduct of government" (*Flast* v. *Cohen*, 392 U.S. 83, 106 (1968)), and protects "the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders" (*United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)). Thus, "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the [plaintiff] organization is in evaluating the problem," is not sufficient

to confer standing to sue. *Sierra Club* v. *Morton*, 405 U.S. 727, 739 (1972). "Abstract injury" (*O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974)) and "abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III" (*Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 40). Absent a demonstration of particularized harm, strongly felt convictions about the subject matter of a suit do not confer standing because "[e]motional involvement in a lawsuit is not enough to meet the case-or-controversy requirement * * *." *Ashcroft* v. *Mattis*, 431 U.S. 171, 173 (1977).

These principles apply with particular force when a plaintiff attempts to litigate general grievances about the operation of the government that are shared in substantially equal measure with all other citizens. When all citizens share a common interest in the issue tendered by the complaint, redress is properly sought through the political process. See *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 220 (1974) ("standing to sue may not be predicated upon an interest * * * which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share"); *United States* v. *Richardson*, *supra*, 418 U.S. at 176-179. Remitting plaintiffs who purport to "represent society" (see page 11, *supra*) to their political remedies does not depreciate the importance of the constitutional principles they assert. Rather, it gives proper recognition to the proposition that the political branches "are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry.* v. *May*, 194 U.S. 267, 270 (1904).

As we demonstrate in this brief, the court of appeals' recognition of standing to sue in the present case is alien to the principles summarized above and has the necessary effect of expanding judicial power beyond recognized constitutional and prudential limits. The govern-

ing decisions of this Court establish that the plaintiffs in this case do not have standing to sue either in their capacity as "taxpayers" or as "citizens."[9]

[9] In their brief in opposition in this Court (Br. in Opp. 4-8, 15-19) plaintiffs devote substantial argument to the merits of their complaint. Their submission appears to be that, in view of the serious violation of the Establishment Clause that they perceive, it is simply inconceivable that they should be denied standing to sue. That line of argument, however, is inconsistent with this Court's decisions. See *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, 418 U.S. at 227: "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." This Court has not hesitated to apply traditional rules of standing simply because a particular plaintiff alleges a violation of the Establishment Clause. See *Doremus* v. *Board of Education*, 342 U.S. 429, 432-435 (1952).

We note in passing, however, that plaintiffs' view of the merits of their complaint is based on a misunderstanding of the relevant facts. This is not a case involving donation of federal funds to a pervasively sectarian institution. The government entered into a contract of sale in this case after offering the surplus military property to a variety of public and private non-profit institutions. It is immaterial that the sale contract exchanged government property for services rather than cash. The contract conveyed surplus property in exchange for valuable consideration—a promise by the college to provide secular services to the community. See C.A. App. 196: "The college will be offering many courses tailored to the needs of the community. * * * The transfer of this property is not a gift." Those services took the form of furnishing safe housing for students, increasing courses in secular subjects such as arts, humanities, and psychology, and providing training for counselors in inner city areas. See *id.* at 250. There is no reason to assume that a college, which provides both secular and sectarian instruction, cannot offer the community significant secular services. See *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 755-759 (1976). See generally *Walz* v. *Tax Commission of New York*, 397 U.S. 664, 672-673 (1970); see also *id.* at 687-689, 692-693 (Brennan, J., concurring), 696-697 (Harlan, J., concurring). Moreover, the decisions of this Court recognize that the government may extend benefits to church-controlled institutions in exchange for the provision of certain secular services. See *Roemer* v. *Maryland Public Works Board*, *supra*, 426 U.S. at 746; *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). We also observe that

## I. PLAINTIFFS DO NOT HAVE STANDING AS TAXPAYERS TO CHALLENGE THE GOVERNMENT'S SALE OF SURPLUS MILITARY PROPERTY

The only basis for standing to sue asserted in the complaint in this case is the alleged harm suffered by plaintiffs in their capacity as "taxpayers." See J.A. 10.[10] However, as the district court held (Pet. App. A42-A44), and as each member of the panel of the court of appeals agreed (Pet. App. A14-A17 (Adams, J.); A34 (Rosenn, J.); A35 (Weis, J.)), the plaintiffs in this action do not have standing to sue in their capacity as taxpayers.

### A. The Government's Disposition Of Surplus Military Property, Originally Purchased In 1942, Had No Definable Impact On Plaintiffs' Economic Interests As Taxpayers

Plaintiffs do not specify in their complaint how they were injured in their capacity as taxpayers by the government's sale of surplus military property. However, in their depositions, they claimed that any improper disposition of government property affects them because they have a stake, along with all other citizens, in the total corpus of federal property (see pages 9-11, *supra*). Thus, they maintain that they have been injured despite the fact that the property was purchased in 1942, served

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the relief that plaintiffs seek in this case—rescission and return of surplus property to the United States after the college has expended substantial sums to improve that property—would appear to be foreclosed by this Court's decision in *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973).

[10] The plaintiff organization, Americans United, pays no taxes (Pet. App. A4, A43; C.A. App. 192). And it claims no injury to itself apart from the injury that its taxpayer members allegedly have sustained. In these circumstances, the organization's standing rests on no firmer ground than that of its individual members. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 40; *Warth* v. *Seldin*, *supra*, 422 U.S. at 511; *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 739-741.

for over 30 years as a military hospital, and finally was sold as surplus property after it had served its intended function. They also apparently believe that they would be economically benefited as taxpayers if the property were returned to the government so that the government could make other arrangements for its disposition.[11] We submit, however, that plaintiffs have made no logical demonstration of any relationship between the challenged sale of surplus property and their economic interest as taxpayers, and that the decisions of this Court clearly preclude standing to sue on a taxpayer theory.

In *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), this Court undertook a thorough examination of the subject of taxpayer standing. The taxpayer plaintiff in *Frothingham* challenged the constitutionality of the Maternity Act of 1921, which provided for annual disbursements to state authorities to reduce maternal and infant mortality and protect the health of mothers and infants. The plaintiff contended that the challenged statute took her property, under the guise of taxation, without due process of law. This Court concluded (262 U.S. at 487) that the plaintiff lacked standing to sue because

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[11] As previously noted (see pages 5-6, *supra*), this property stood vacant for two years while the government attempted to find suitable purchasers. During that period, the financial burden of maintaining and protecting the vacant 181 acre tract, its 113 buildings, and the equipment on the property, fell solely upon the government (C.A. App. 231). (The Department of Education advises us that the cost per year of maintaining the property exceeded $250,000.) A return of the property would require the government once again to assume the burden and expense of its maintenance. Rescission of the transaction also would deprive the government of the public service benefits that it now receives under the sale agreement. Finally, selecting a new purchaser would require the government to prepare another "Reuse Plan" for the property and to reassemble the various committees of government officials, community members, and advisers needed to review proposals from prospective purchasers. The numerous studies that preceded the original sales were both voluminous and expensive.

> [a taxpayer's] interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.
>
> The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern.

The Court added that a taxpayer complaining of improper disbursements of federal funds asserts a grievance common to all, not a concrete personal injury, and therefore his complaint is not subject to judicial cognizance (*id.* at 488):

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.

Following the decision in *Frothingham*, this Court confirmed that taxpayers challenging governmental action under the Establishment Clause also must allege concrete personal injury. In *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), the plaintiffs brought suit as citizens and taxpayers to challenge a state statute authorizing school teachers to read passages from the Bible in the classroom. This, in plaintiffs' view, constituted a misapplication of the services of school teachers whose salaries were paid by taxpayers. The Court concluded, however, that the plaintiffs lacked standing to sue in their capacity as taxpayers (*id.* at 433-434; citation omitted):

> This Court has held that the interests of a taxpayer in the moneys of the federal treasury are too indeterminate, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure. * * * Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The *Frothingham* doctrine clearly precludes taxpayer suits of the kind before the Court in this case. The plaintiff in *Frothingham*, whose interest was found to be too remote and uncertain to predicate standing, challenged substantial and recurring appropriations from the federal treasury. In the present case, by contrast, plaintiffs challenge only a single sale of surplus military property and suggest no ground for concluding that rescission of the sale would significantly increase or preserve the wealth of the federal government.

### B. This Court's Decision In *Flast* v. *Cohen* Confirms That Plaintiffs Do Not Have Standing To Sue As Taxpayers

In 1968, this Court returned to the subject of taxpayer standing and further elaborated the governing legal principles. In *Flast* v. *Cohen*, *supra*, the Court concluded that taxpayers in certain cases have standing to attack governmental action alleged to be in violation of the Establishment Clause, but limited the availability of taxpayer suits to carefully defined circumstances. Under *Flast*, a taxpayer asserting an Establishment

Clause violation "may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case" (392 U.S. at 101).

The plaintiff taxpayers in *Flast* brought suit to enjoin a massive and recurring expenditure of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965. As the Court observed, "almost $1,000,000,000 was appropriated to implement the Elementary and Secondary Education Act" in its first year of operation (392 U.S. at 103 n.23). In upholding taxpayer standing in *Flast*, the Court prescribed a two part "nexus" test, the first part of which is directly pertinent here. The Court articulated the first part of its test as follows (*id.* at 102; emphasis supplied):

> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. *Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution.* It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

The quoted language from *Flast* imposes two requirements. *First*, the plaintiff must challenge "exercises of congressional power"—as opposed to exercises of executive power. *Second*, the plaintiff must challenge governmental action "under the taxing and spending Clause of Art. I, § 8, of the Constitution."[12] By prescribing these restrictions, *Flast* bars actions by a taxpayer who

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[12] *Flast* emphasized these two elements throughout. See, *e.g.*, 392 U.S. at 103, noting that the plaintiffs challenged "an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds." See also 392 U.S. at 106.

seeks "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System" (392 U.S. at 106).

In subsequent decisions, this Court repeatedly has stated that *Flast* only "slightly lowered" the barrier to taxpayer suits prescribed in *Frothingham* and *Doremus*. See *United States* v. *Richardson*, *supra*, 418 U.S. at 173, 176-177; see also *id.* at 194 (Powell, J., concurring) (*Flast* created only a "stringently limited exception for federal taxpayer standing"). Accordingly, the Court has declined invitations to extend taxpayer standing beyond the limitations prescribed in *Flast*. See *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, 418 U.S. at 227-228; see also *id.* at 228-229 (Stewart, J., concurring).

Applying the *Flast* standard here, it is plain that plaintiffs lack standing to sue. Plaintiffs do not challenge any action by Congress. Rather, they complain solely that an executive department (the Department of Health, Education, and Welfare) selected an improper party with whom to contract under the Federal Property and Administrative Services Act of 1949. They do not contend that the Act itself is unconstitutional.[13] Accordingly, their complaint fails to allege a controversy cognizable in a taxpayer action. See *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, 418 U.S.

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[13] During their depositions, the plaintiffs explicitly disclaimed any intention to challenge the constitutionality of the statute. See Gunn deposition, *supra*, at 14:

> Q. You don't then complain that the Federal Property and Administrative [Services] Act of 1949 is unconstitutional?
>
> A. No.

Accord, Doerr deposition, *supra*, at 23 ("An action by Government or an application of law by Government is what I'm objecting to and not to any law itself"); Binns deposition, *supra*, at 24-25, 40 ("that law itself is not at fault"); Settembrini deposition, *supra*, at 16.

at 228, denying taxpayer standing because the plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their reserve status." [14]

In addition to their failure to challenge an enactment of Congress, plaintiffs also fail to challenge governmental action under the "taxing and spending clause of Art. I, § 8, of the Constitution." *Flast* v. *Cohen*, *supra*, 392 U.S. at 102. Plaintiffs do not contest the government's expenditure of tax funds in 1942 for the purchase of land and construction of a military hospital. To the contrary, they attack HEW's decision, made over 30 years later, to dispose of surplus government property. That decision was made pursuant to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 *et seq.*, and was authorized by Article IV, Section 3, Clause 2, of the Constitution, which empowers Congress "to dispose of * * * Property belonging to the United States." [15] Since they challenge government action under the property clause, rather than the taxing and spending clause, plaintiffs fail to meet the prerequisites set forth in *Flast*. See *United States* v. *Richardson*, *supra*, 418 U.S. at 174-175: "The mere recital of the [plaintiff's] claims and an examination of the statute under attack demonstrate how far he falls short of the standing criteria of *Flast* and how neatly he falls within the

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[14] The courts of appeals consistently have held that taxpayers may not bring suit to challenge actions of the executive, as opposed to congressional enactments. See, *e.g.*, *American Jewish Congress* v. *Vance*, 575 F.2d 939, 944 (D.C. Cir. 1978); *Public Citizen, Inc.* v. *Simon*, 539 F.2d 211, 216-219 (D.C. Cir. 1976); *Mottola* v. *Nixon*, 464 F.2d 178, 182 (9th Cir. 1972).

[15] Decisions of the lower courts confirm that the Federal Property and Administrative Services Act is an exercise of Congress' power under Article IV, Section 3, Clause 2, of the Constitution. See, *e.g.*, *United States* v. *Cassiagnol*, 420 F.2d 868, 876 (4th Cir.), cert. denied, 397 U.S. 1044 (1970). See generally *Ashwander* v. *TVA*, 297 U.S. 288, 330 (1936); *Kleppe* v. *New Mexico*, 426 U.S. 529, 539-541 (1976).

*Frothingham* holding left undisturbed. Although the status he rests on is that he is a taxpayer, his challenge is not addressed to the taxing or spending power, but to the statute regulating the CIA * * *." [16]

In sum, because plaintiffs' complaint fails to satisfy the narrowly defined standards prescribed in *Flast*, the courts below correctly concluded that plaintiffs lack standing to sue as taxpayers.

### C. There Is No Logical Basis For Enlarging Taxpayer Standing To Encompass Claims Of The Kind Asserted By Plaintiffs

Plaintiffs nonetheless assert (Br. in Opp. 12) that rules of standing are evolutionary in nature and should evolve in an expansive manner to facilitate judicial resolution of their claims. Apart from the fact that *Flast* itself drew definite limits to avert an unwarranted tide of taxpayer suits, and apart from the fact that this Court's decisions in *Schlesinger* and *Richardson* declined to enlarge the scope of taxpayer suits, there is no merit to this line of argument. In simple terms, the issue that plaintiffs seek to litigate in federal court has no logical relationship to their status as taxpayers. Judge Leventhal, writing for the D.C. Circuit in *Public Citizen, Inc.* v. *Simon*, 539 F.2d 211, 218-219 (1976) (footnotes omitted), explained why taxpayer status has no meaningful nexus to a controversy such as this:

> [*Flast*] was rooted in a conceptual underpinning, permitting federal taxpayer standing in a class of cases where taxpayer suits were particularly appropriate and manageable—specifically, in cases involving the validity of taxing and appropriation statutes (as distinguished from cases involving "in-

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[16] See also *Velvel* v. *Nixon*, 415 F.2d 236, 238-239 (10th Cir. 1969); *Reich* v. *City of Freeport*, 527 F.2d 666, 670, (7th Cir. 1975); L. Tribe, *American Constitutional Law* 84 & n.18 (1978) (noting that *Flast* draws a clear distinction "between challenges to spending programs as such and challenges of any other kind").

> cidental expenditure[s] of tax funds in the administration of an essentially regulatory statute"). The impact on federal taxpayers in such cases is conceptually direct, even though the dollar-and-cents consequence for a taxpayer is minimal. * * * What [plaintiffs] lack is what *Flast* found in the case of taxing and appropriations statutes—measures which in their very nature are directed toward taxpayers as a class. When what is involved is expenditures in implementation of a regulatory statute, or mere executive activity that entails some expenditures, there is no similar arrow aimed at taxpayers as a class, but an activity of concern to the public at large.

The governmental actions at issue in this case have only the most remote, indirect, and speculative relationship to plaintiffs' interests as taxpayers. While it is true that the Valley Forge General Hospital was acquired, improved, and maintained by the government with general federal revenues, those funds were spent to procure hospital services—the propriety of which plaintiffs do not challenge. There can be no serious argument that the hospital was acquired so that it could be sold to the college over 30 years later. The property was used as a military hospital for so long as the facility was needed. Once its function was fully served, the value of the hospital as a federal facility was depleted. The end product was, at least from the government's point of view, a useless collection of buildings on a useless plot of land that the government had to dispose of one way or another. That the government chose to do so by transferring a portion of the property to the college in exchange for a commitment to provide certain public benefits, rather than in some other way, simply does not affect the economic situation of a taxpayer.

Although it might be asserted that the land should have been sold for cash, rather than for public service commitments, the failure to sell the land for cash has only a speculative relationship to plaintiffs' status as

taxpayers. Even if a church-affiliated college had not purchased the property, the ultimate purchaser would, in all likelihood, have been another non-profit institution or local school district rather than a purchaser for cash. In the absence of a suitable purchaser, the government might simply have allowed the property to fall into disuse for several years. And if that occurred, the expense to the government from maintaining the property would have been substantial. Moreover, in the absence of a sale to Valley Forge Christian College, the college might have been required to purchase other land and to construct new buildings at great expense. The college would then have had to meet this expense through the solicitation of contributions that would, in turn, have been tax-deductible, thereby reducing government revenues. Finally, if the college chose not to expand, some of its students might have been forced to attend state-supported colleges or private colleges receiving federal grants, thereby increasing the demand for governmental expenditures. In short, the chain of reasoning needed to prove actual monetary harm to the plaintiff taxpayers from the action challenged in this case is far too tenuous to create the "logical nexus" required to predicate standing to sue. *United States* v. *Richardson, supra*, 418 U.S. at 175; see also *Warth* v. *Seldin, supra*, 422 U.S. at 508-509.

## II. PLAINTIFFS DO NOT HAVE STANDING AS CITIZENS TO CHALLENGE THE GOVERNMENT'S SALE OF SURPLUS MILITARY PROPERTY

Having found that plaintiffs failed to allege injury to themselves as taxpayers, the court of appeals should have affirmed the judgment of the district court dismissing their complaint, for the complaint in this case alleges no other form of injury.[17] Nonetheless, the court hypothe-

[17] Paragraph 2 of the complaint (J.A. 10) asserts only that "each individual member [of Americans United] would be deprived of the fair and constitutional use of his (her) tax dollar

sized a type of harm not mentioned in the complaint and predicated standing to sue on that basis. The court began by asserting that (Pet. App. A18-A19), "[a]s a matter of primary identity, the plaintiffs are not so much taxpayers as separationists, and their main concern is not a reduction in taxes, but their declared goal of separation of church and state." The court then expressed its view of the thrust of their claim—"that the challenged action injures their important *concern* in the separation of church and state" (*id.* at A21; emphasis supplied). By the end of the court's opinion, this injury to an abstract "concern" was transformed into "a particular and concrete injury" (*id.* at A27). Building on this premise, the court announced a rule of standing that would appear to permit every citizen to complain about any governmental action believed to be in violation of the Establishment Clause (*id.* at A28-A29):

> [W]e believe it is at the very least arguable that the Establishment Clause creates in each citizen a "personal, constitutional right" to a government that does not establish religion. * * * As a cornerstone of our government, it may well be that the Establishment Clause should be enforceable at the demand of every individual who claims an injury to an interest protected thereby.

Although the court of appeals' desire for vigorous enforcement of the Establishment Clause is understandable, its reasoning cannot withstand scrutiny under Article III of the Constitution. As important as it is, the Establishment Clause creates no exception to the threshold

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for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution." Paragraphs 3 through 6 of the complaint (*id.* at 10-11) allege simply that each of the individual plaintiffs is a "taxpayer of the United States." In requesting equitable relief, paragraph 13 of the complaint (*id.* at 11) pleads generally that plaintiffs will suffer "irreparable harm," but no harm other than taxpayer harm is specified in the complaint.

Article III "case or controversy" requirement. Claims of violation of the Establishment Clause, like any other claims of constitutional impropriety, are matters for *judicial* cognizance if and only if the complaining party alleges concrete and particularized injury as a consequence of the violation.[18] In the absence of such an allegation, the asserted constitutional violation is a matter for redress through the executive and legislative branches, whose officials also are charged with upholding the Constitution and whose function it is to protect all citizens against wrongs to the people as a whole.

### A. Plaintiffs Have Alleged No Concrete And Particularized Injury To Themselves That Separates Them From Other Citizens And Confers Standing To Sue

1. Conspicuous by its absence from the complaint, and from the court of appeals' opinion, is any indication how the government's sale of 77 acres of surplus military property in Chester County, Pennsylvania, had an actual concrete effect on any of the plaintiffs. The named plaintiffs live in Maryland and Virginia; their association is based in Washington, D.C. (J.A. 10). They learned of the sale of property only through a news release (C.A. App. 159, 194; Doerr deposition, *supra*, at 44). Had they not happened to read the newspaper article, it is a fair inference that they never would have known of the transaction. There is not the slightest suggestion that the sale interfered with their freedom to worship or to decline to worship; impaired their operations as an organization; or imposed upon them unwelcome ideas, orthodoxies, or observances. As Judge Weis noted in dissent (Pet. App. A39): "[t]he plaintiffs do not allege any direct injury that the transfer of the property has inflicted upon them or any direct benefit that will accrue to them as a result

[18] Paraphrasing *Flast* v. *Cohen*, *supra*, 392 U.S. at 101, a citizen "may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case."

of the requested judicial action. Their freedom of religion is not alleged to be affected in any respect." The only effect of the transaction on plaintiffs is that it provoked their disapproval on philosophical grounds. In the words of the court of appeals (Pet. App. A18-A19), they felt "concern" about "their declared goal" of separation of church and state. Or, in the words of plaintiff Doerr (see page 11, *supra*), they were "offended" by the government's action.

We do not for a moment suggest that plaintiffs' concern for constitutional government is other than a sincere and commendable one. But we do suggest that their concern is not a substitute for judicially cognizable injury. As this Court has observed, "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself" to predicate standing to sue. *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 739 (quoting *Environmental Defense Fund* v. *Hardin*, 428 F.2d 1093, 1097 (D.C. Cir. 1970)). "Abstract injury is not enough" (*O'Shea* v. *Littleton*, *supra*, 414 U.S. at 494); nor is "emotional involvement in a lawsuit" a substitute for actual concrete harm (*Ashcroft* v. *Mattis*, *supra*, 431 U.S. at 173).

Because plaintiffs in this case allege an injury to a principle they espouse, rather than a direct and tangible injury to themselves, they are not situated differently from all other citizens concerned with constitutional government. They allege no more personal interest than a citizen claiming that "In God We Trust" should be stricken from federal currency, that religious hymns should be discontinued at military ceremonies, or that the Marshal of the Supreme Court should abandon the traditional cry: "God Save This Honorable Court." No individual citizen has a direct and palpable interest in the resolution of such abstract claims.

2. Two decisions of this Court, arising under the Establishment Clause, illustrate our contention concern-

ing the citizen standing issue. In *Doremus* v. *Board of Education*, *supra*, 342 U.S. at 431-435, the plaintiffs brought suit both in their capacity as taxpayers and as concerned "citizens." They sought a declaration that a state statute, requiring the reading of passages from the Bible in school classrooms, infringed the Establishment Clause of the First Amendment. For reasons discussed on pages 23-24, *supra*, the Court found that the plaintiffs lacked standing as taxpayers. In addition, however, the Court found no basis for "citizen" standing. The Court observed that none of the plaintiffs had children currently attending the schools in question (*id.* at 432), and described their asserted grievance as a mere "religious difference" (*id.* at 434). The Court also observed that standing is "not a question of motivation," but of possession of a tangible personal interest that is injured or threatened by the unconstitutional conduct (*id.* at 435).[19]

In *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), the Court considered a complaint raising the same substantive issue. In *Schempp*, however, the substantive Establishment Clause claim was presented by a party having a direct personal stake in the outcome of the suit. The plaintiffs were parents of school children who were subjected to religious "exercises" in the classroom. The Court noted that "[i]t goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain" (*id.* at 224 & n.9). The Court found standing to exist, however, because "the parties here are school children

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[19] In view of this Court's decision in *Doremus*, the court of appeals clearly erred in asserting that "the Establishment Clause creates in each citizen a 'personal constitutional right' to a government that does not establish religion" (Pet. App. A28-A29) and that "the Establishment Clause should be enforceable at the demand of every individual who claims injury to an interest protected thereby" (*id.* at A29). In the absence of concrete personal injury, there is no such judicially enforceable right.

and their parents, who are directly affected by the laws and practices against which their complaints are directed" (*id.* at 224 n.9). As the Court explained, the challenged laws "require religious exercises and such exercises are being conducted in direct violation of the rights" of the school children and parents (*id.* at 224). See also *id.* at 206-212 (summarizing the concrete effect of the Establishment Clause violation on the plaintiffs).

The plaintiffs in this case fall into the category of concerned bystanders barred from suit by *Doremus*. In contrast to *Schempp*, the action of the government challenged in this case has no definable effect on plaintiffs, and their "concern" does not differ from that of other citizens throughout the nation.

3. Other decisions of this Court considering the availability of citizen suits leave no room to doubt that plaintiffs, challenging constitutional violations that affect all other citizens in a substantially identical manner, are precluded from seeking redress in federal court. We briefly summarize the leading decisions below.

In *Ex parte Levitt*, 302 U.S. 633 (1937), this Court held that individual citizens lacked standing to challenge the constitutionality of the appointment of a Supreme Court Justice. Despite the manifest importance of the issue to all citizens, the Court concluded (*id.* at 634):

> The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.

Any lingering doubts about the availability of citizen complaints to litigate generalized constitutional claims

were laid to rest by *Schlesinger* v. *Reservists Committee to Stop the War, supra.* There, the plaintiffs sued both in their capacity as taxpayers and as "citizens." They alleged that membership of certain Congressmen in the military reserves violated Article I, Section 6, Clause 2, of the Constitution, which provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." According to the plaintiffs, membership of Congressmen in the military exposed Congress as an institution to "the possibility of undue influence by the Executive Branch" during the Vietnam conflict (418 U.S. at 212).

Despite the gravity of the harm that they alleged, this Court held in *Schlesinger* that the plaintiffs lacked standing to sue in their capacity as citizens. The Court observed that the alleged constitutional violation "would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury" (418 U.S. at 217). It added that "standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution" (*id.* at 220-221). Most significantly, the Court rejected the assertion that the importance of a particular constitutional guarantee to our system of government was a sufficient justification for relaxing the Article III standing requirement (*id.* at 226-227):

> All citizens, of course, share equally an interest in the independence of each branch of Government. In some fashion, every provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a "case or controversy" appropriate for judicial resolution.

See also *id.* at 220 n.8 (collecting prior decisions of the Court rejecting general citizen claims).

This Court reiterated these principles in *United States* v. *Richardson*, *supra*. Although the plaintiffs in *Richardson* contended that the constitutional violation that they sought to redress—the use of a secret budget by the Central Intelligence Agency, allegedly in contravention of Article I, Section 9, of the Constitution—interfered with their right to cast the ballot in an intelligent fashion, this Court concluded that the asserted claim was not a claim of concrete personal injury (418 U.S. at 176-177):

> The [plaintiff's] claim is that without detailed information on CIA expenditures—and hence its activities—he cannot intelligently follow the actions of Congress or the Executive, nor can he properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office.
>
> This is surely the kind of a generalized grievance described in both *Frothingham* and *Flast* since the impact on him is plainly undifferentiated and "common to all members of the public."

These decisions provide a fortiori support for the proposition that plaintiffs in this case lack standing to sue as citizens. Plaintiffs here do not contend that the legislative branch is subject to a conflict of interest that prevents it from providing them with effective representation (as in *Schlesinger*), or that use by the government of a secret budget precludes them from casting their ballot in an informed manner (as in *Richardson*). They claim only that a particular sale of surplus property, alleged to infringe the Establishment Clause, offends their organizational goal of assuring separation of Church and State. That, however, is a grievance that they share with all other citizens. And because their claim of injury is even more general and abstract than the claims rejected in *Richardson* and *Schlesinger*, it clearly is appropriate to remit them to

their remedies in the executive and legislative branches. See *Warth* v. *Seldin*, *supra*, 422 U.S. at 499; *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 40.[20]

### B. The Doctrine Of Separation Of Powers, Implicit In Article III Of The Constitution, Militates Against Judicial Recognition Of Generalized Citizen Claims

1. In the view of the majority of the court of appeals, the dignity and importance of the Establishment Clause in our scheme of government is a sufficient basis to invoke the judicial power in all cases brought by citizens. Judge Adams indicated (Pet. App. A29) that the Establishment Clause is "a cornerstone of our government" that should "be enforceable at the demand of every individual who claims an injury to an interest protected thereby." [21] Judge Rosenn, in his concurring opinion, likewise referred (*id.* at A35) to "the need to provide a judicial forum for the vindication of Establishment

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[20] Following *Schlesinger* and *Richardson*, the lower courts consistently have rejected citizen complaints alleging generalized grievances of the kind asserted in this case. See, *e.g.*, *O'Hair* v. *Hill*, 641 F.2d 307, 309-310 (5th Cir. 1981) (finding no standing to assert Establishment Clause claims directed toward a provision in the Texas constitution; the court noted that the plaintiffs "pleaded no cognizable injury in relation to [their] claim. They do not allege any effect the asserted establishment of religion has had on them * * *"). Accord, *Citizens Concerned for Separation of Church and State* v. *City and County of Denver*, 628 F.2d 1289, 1301 (10th Cir. 1980); *American Jewish Congress* v. *Vance*, 575 F.2d 939, 944 (D.C. Cir. 1978). See also *Korioth* v. *Briscoe*, 523 F.2d 1271, 1276 (5th Cir. 1975) ("the thin ice which may have supported generalized citizen standing to pursue 'public actions' before *Schlesinger* seems to have melted with that case").

[21] The thrust of this statement is sufficiently clear—"every individual" is deemed a proper plaintiff to contest an "injury to an interest" protected by the Establishment Clause. The court of appeals' focus is thus on the interests inherent in the Establishment Clause, rather than the personal interests of the party invoking the judicial process.

Clause interests." These assertions, however, fail to take account of the requirements of Article III of the Constitution. In determining whether a plaintiff has standing to sue, the dispositive question is whether he has alleged direct and tangible injury to himself, not whether the constitutional principle that he seeks to vindicate is important. Thus, in *Richardson* and *Schlesinger*, citizen claims were rejected despite their manifest importance to the nation, and despite the fact that the constitutional guarantees at issue were basic to our system of government.

As this Court explained in *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, 418 U.S. at 227: "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." See also *United States* v. *Richardson*, *supra*, 418 U.S. at 179 (emphasis in original), which amplified this basic proposition:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. * * * The Constitution created a *representative* Government with the representatives directly responsible to the constituents at stated periods * * *; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls.

These considerations are directly relevant here. While we acknowledge that the constitutional guarantee at issue in this case differs from the constitutional guarantees at issue in *Schlesinger* and *Richardson*, we submit that the nature of the injury is the same, for plaintiffs' complaint avers nothing more than a generalized grievance common to all citizens. Like the plaintiffs in *Frothingham*, *Levitt*, *Doremus*, *Schlesinger*, and *Richardson*, plaintiffs seek to vindicate the common right of citizens to live in a society in which the government complies with the Constitution. This Court's decisions leave little doubt that such claims must be vindicated in the legislative and executive branches.

It is true, of course, that the federal courts must be alert to entertain complaints from individuals alleging personal harm from government action violative of the Constitution.[22] Claims such as those in the present case, however, can be submitted to the coordinate branches of government without danger of encroachment on any individual interest. We are advised that the Department of Education is now in the process of reviewing its procedures for contracting with church-related educational institutions for the sale of surplus property. During this period of inquiry, plaintiffs may present their views to the Department of Education, and, if they are dissatisfied with the response, they may present their views both to their representatives in Congress and to appropriate officials in the Executive Branch.[23]

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[22] See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943): "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

[23] At the time of the transfer of property in this case, plaintiffs submitted a letter to HEW containing only the most conclusory objection to the transfer (C.A. App. 195). They did not seek redress from Congress or otherwise pursue their political remedies (*id.* at 160-161; see also Doerr deposition, *supra*, at 43-44).

The existence of a representative government responsive to the electorate, and the continuous scrutiny of government actions by the news media, are sufficient safeguards against hypothetical abuses of the kind cited by the court of appeals such as a donation of "the Naval Observatory or the Army War College" to a religious sect (Pet. App. A30). Putting aside the constitutional implications of such a donation, any appearance of waste or misappropriation would suffice to trigger Congressional and Executive review. See 10 U.S.C. 2662 (requiring the military departments to submit specific reports to both houses of Congress before disposing of surplus property valued at more than $50,000). As Judge Weis observed (Pet. App. A40): "I, for one, am unwilling to believe that Congress, responsive as it is to public opinion, is likely to give away either the Naval Observatory or the Army War College." The voices of concerned citizens, professing to "represent society," would surely receive consideration from Congress in such a case. See *United States* v. *Richardson*, *supra*, 418 U.S. at 188-189 (Powell, J., concurring; citation omitted):

> [T]he argument that the Court should allow unrestricted taxpayer or citizen standing underestimates the ability of the representative branches of the Federal Government to respond to the citizen pressure that has been responsible in large measure for the current drift toward expanding standing. Indeed, taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of the government. "We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government, 'are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'" [24]

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[24] We do not dismiss the possibility that, under certain circumstances, a plaintiff would have standing to maintain a suit such

2. A final ground for declining plaintiffs' invitation to recognize citizen standing in cases such as this—a ground closely related to the separation of powers doctrine discussed immediately above—is the traditional prudential concern for controlling the docket of federal courts and avoiding unnecessary adjudication of "questions of broad social import where no individual rights would be vindicated." *Gladstone, Realtors* v. *Village of Bellwood, supra*, 441 U.S. at 100; see also *Warth* v. *Seldin, supra*, 422 U.S. at 500.

It is easy to identify the impairment in the judicial function that would result from abandonment of traditional prudential restraints on standing. There are in this nation innumerable organizations and individuals committed to the advancement of special interests and ideological causes of all descriptions. Some of them are, quite legitimately, devoted to litigation as a principal means of attaining their ends, but they should be permitted to do so only through plaintiffs who can show the injury in fact that the standing doctrine requires. If the standing requirement were relaxed, there would be a significant increase in the number of groups and persons who would accept the opportunity to press their general interests and debate their ideological theories in

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as this challenging the transfer of surplus real property. For example, the court of appeals recognized that a rival purchaser, whose bid was rejected by the government in favor of a church-related institution, might have a personal stake in challenging the validity of the transfer. See Pet. App. A25 n.72, A34; see also *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970) (a disappointed bidder for a government contract has standing to obtain judicial review of a claim of illegality in the award to a rival). The potential availability of a plaintiff with an actual pecuniary stake in the issues that plaintiffs seek to litigate in this proceeding is an additional reason for denying standing to sue. See Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297, 308-310 (1979). Of course, a single test case, filed by an appropriate plaintiff, should suffice to settle the applicable legal principles.

federal courts.[25] The adverse practical consequences of such a development for the federal judicial system are apparent. See *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 739-740.[26]

These prudential problems arose in *Flast* v. *Cohen*, *supra*, where the plaintiffs sought to sue both in their

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[25] The standing requirement channels to the political branches all abstract claims of constitutional impropriety, without regard to the "conservative" or "liberal" cast of those claims. Thus, the standing requirement forecloses judicial review of abstract challenges to welfare legislation, as in *Frothingham*, just as it forecloses judicial review of abstract challenges to laws mandating prayer in school, as in *Doremus*.

[26] It requires no extended discussion to identify the problems that a relaxation in the standing requirement would introduce. Eliminating the requirement of a personal stake in judicial proceedings would result in an increase in the number of cases filed, but also would cause a decline in the vigor of adversary presentation in many such cases. Without a true adversary presentation, legal issues, including constitutional issues of profound importance, would come before the courts as abstractions without an adequately developed factual context. When a state or federal statute is called into question, or a state or federal executive action is challenged, it is essential that the complaining party demonstrate to the court the way the law or action actually impinges upon him. Otherwise, federal courts would be required to adjudicate the constitutionality of measures whose real effects they cannot fully appreciate or evaluate—a course akin in its disadvantages to the issuance of advisory opinions.

These problems would be particularly pronounced in challenges based on the Establishment Clause. Because this Court has acknowledged that total separation of Church and State is not possible and that "the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship" (*Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971)), virtually every contact between the government and a religious institution potentially raises an Establishment Clause violation. The court of appeals would allow any citizens to bring suit to challenge such contacts merely by alleging that the contact "injures their important concern in the separation of church and state" (Pet. App. A21) or "injures their individual and personal constitutional right of religious liberty and separation of church and state" (*id.* at A27).

capacity as taxpayers and as citizens. As previously noted, the Court granted standing to the plaintiffs as taxpayers, but did so only pursuant to narrowly defined rules that were carefully prescribed to prevent a flood of litigation. While the plaintiffs in *Flast* advocated a "citizen" standing theory (see Pet. App. A39), and while Justice Fortas referred to the possibility that that theory would meet with approval (392 U.S. at 115-116), the majority did not accept such a view. In his dissenting opinion in *Flast*, Justice Harlan shed considerable light on the reasons for the majority's unwillingness to permit "citizens" to present "generalized grievances about the conduct of government." Because Justice Harlan's opinion is directly pertinent to the prudential issues involved in this case, we quote from it at length (392 U.S. at 129-130 n.18; emphasis in original):

> I have equal difficulty with the argument that the religious clauses of the First Amendment create a "personal constitutional right," held by all *citizens*, such that any *citizen* may, under those clauses, contest the constitutionality of federal expenditures. The essence of the argument would presumably be that freedom from establishment is a right that inheres in every citizen, thus any citizen should be permitted to challenge any measure that conceivably involves establishment. Certain provisions of the Constitution, so the argument would run, create the basic structure of our society and of its government, and accordingly should be enforceable at the demand of every individual. * * * [S]uch a doctrine of standing would * * * threaten the proper functioning both of the federal courts and of the principle of separation of powers. The Establishment Clause is, after all, only one of many provisions of the Constitution that might be characterized in this fashion. Certain of those provisions, *e.g.*, the Ninth and Tenth Amendments, would provide the basis for cases that, absent a standing question, could not readily be excluded from the

> federal courts as involving political questions, or as otherwise unsuitable for adjudication * * *. [A]ny doctrine of standing premised upon the generality or relative importance of a constitutional command would, I think, very substantially increase the number of situations in which individual citizens could present for adjudication "generalized grievances about the conduct of government." I take it that the Court, apart from my Brother Douglas, and I are agreed that any such consequence would be exceedingly undesirable.

Justice Harlan's views on the undesirability of general citizen standing have since received endorsement in decisions of this Court such as *Richardson* and *Schlesinger*. The prudential concerns expressed by Justice Harlan and by the Court in these subsequent decisions militate strongly against recognition of citizen standing in the circumstances of this case.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

1. Article I, Section 8, Clause 1, of the Constitution provides in pertinent part:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *.

2. Article III, Section 2, Clause 1, of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

3. Article IV, Section 3, Clause 2, of the Constitution provides in pertinent part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *.

4. The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.

5. Section 3(g) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 472(g), provides:

> The term "surplus property" means any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the [General Services] Administrator.

6. Section 203 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 484, provides in pertinent part:

> (a) Except as otherwise provided in this section, the [General Services] Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.
>
> * * * * *
>
> (k)(1) Under such regulations as he may prescribe, the Administrator is authorized, in his discretion, to assign to the Secretary of Health, Education, and Welfare for disposal such surplus real property, including buildings, fixtures, and equipment situated thereon, as is recommended by the Secretary of Health, Education, and Welfare as being needed for school, class-

room, or other educational use, or for use in the protection of public health, including research.

(A) Subject to the disapproval of the Administrator within thirty days after notice to him by the Secretary of Health, Education, and Welfare of a proposed transfer of property for school, classroom, or other educational use, the Secretary of Health, Education, and Welfare, through such officers or employees of the Department of Health, Education, and Welfare as he may designate, may sell or lease such real property, including buildings, fixtures, and equipment situated thereon, for educational purposes to the States and their political subdivisions and instrumentalities, and tax-supported educational institutions, and to other nonprofit educational institutions which have been held exempt from taxation under section 501(c)(3) of Title 26.

* * * * *

(C) In fixing the sale or lease value of property to be disposed of under subparagraph (A) * * * of this paragraph, the Secretary of Health, Education, and Welfare shall take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by any such State, political subdivision, instrumentality, or institution.

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